No. 660

JOHN F. DAVIS, CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1967

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACK, SAND LAKE AND NORTH GREENBUSH, RENSSELAER COUNTY AND CHATHAM, COLUMBIA COUNTY AND BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD AND OYSTER BAY, NASSAU COUNTY, NEW YORK,

Plaintiffs-Appellants,

against

JAMES E. ALLEN, JR., AS COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendant-Respondent,

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH AND BARBARA BRENNAN,

Intervenor-Defendants-Respondents.

BRIEF FOR STATE OF LOUISIANA AMICUS CURIAE

JACK P. F. GREMILLION,
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of Counsel

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STATEMENT

Your Honors granted a Writ of Certiorari to review the decision of the Court of Appeals of the State of New York, which is reported at 20 N.Y. 2d 109, 281 N.Y.S. 2d 799, 228 N.E. 2d 791. The sole question to be decided is whether New York's Textbook Loan Law, Section 701 of the Education Law, Consol. Laws,

c. 16, runs afoul of the Establishment Clause of the First Amendment to the United States Constitution.

Education Law, Sec. 701, as amended by Laws of 1965, Chapter 320, provides in pertinent part that:

> "In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities."

New York Court of Appeals

Answering the contention that the above statute violates Article XI, Section 3 of the New York Constitution, which prohibits the use of property, credit or funds belonging to the State or subdivision of the State for aiding or maintaining, either directly or indirectly, church schools, the New York Court of Appeals reasoned as follows:

> "The purpose underlying section 701, found in the Legislature's own words (L. 1965, ch. 320, § 1; supra), belies any interpretation other than that the statute is meant to bestow a public benefit upon all school children, regardless of their

school affiliations. There can be no serious suggestion that the declaration of purpose by the Legislature was a verbal smoke screen designed to obscure a nefarious scheme to circumvent the New York State Constitution. No one in the last third of the 20th Century can doubt that a program aimed at improving the quality of education in all schools is a matter of legitimate State concern.

"Since there is no intention to assist parochial schools as such, any benefit accruing to those schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly.

"Only textbooks designated for use by the public schools or approved by Boards of Education, trustees or school authorities may be lent (Education Law, § 701, subd. 3). The State and local governments have long provided public libraries with books for use by all persons. It is not uncommon for schools, public and private alike, to assign various 'outside readings' to pupils. Children often, then, fulfill assignments for courses in both public and private schools by means of using and borrowing from public libraries. We do not consider this indirect aid to private or parochial schools." 20 N.Y. 2d 109, 116, 281 N.Y.S. 2d 799, 804, 228 N.E. 2d 791, 794.

In also holding that there was no federal constitutional question under the Establishment Clause of the First Amendment, the Court of Appeals reasoned:

"The State makes no affirmation of religious beliefs or activities within the public schools. Sec-

tion 701 remains completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question about what school he attends. Despite the flexibility of the English language, it is impossible to conclude that loaning nonreligious textbooks to all students, including those who attend a parochial school, establishes a religion or constitutes the use of public funds to aid religious schools. (cf. *Everson v. Board of Educ. of Ewing Tp.*, 330 U.S. 1, 16, 18, 67 S.Ct. 504, 91 L.Ed. 711)." 20 N.Y. 2d 109, 117, 281 N.Y.S. 2d 799, 804, 228 N.E. 2d 791, 794-5.

Louisiana Textbook Case

This Honorable Court, in *Cochran v. Louisiana State Board of Education*, 281 U.S. 370, 50, S.Ct. 335, 74 L.Ed. 913, held Act 100 of the 1928 Regular Session of the Louisiana Legislature, constitutional, affirming the decision of the Louisiana Supreme Court reported at 168 La. 1020, 123 So. 664.

The text of Act 100 of 1928 (R.S. 17:351-353) is as follows:

"Section 1. Be it enacted by the Legislature of Louisiana, That the Severance Tax Fund of the State, as levied by Act 140 of 1922, as amended, shall be devoted after allowing funds and appropriations as provided by the Constitution of the State, first, to supplying school books to the school children of the State of Louisiana, and that thereafter such further sums as remain in the said Severance Tax Fund shall be transferred to the State public school funds.

"Sec. 2. That the State Board of Education of Louisiana shall provide the said school books for school children free of cost to such children out of said tax fund, and thereafter apply the remaining sums out of the said Severance Tax Fund to the State public school funds.

"Sec. 3. That this act shall not apply to persons attending colleges and universities."

The Louisiana Supreme Court affirmed the judgment of the District Court, assigning as reasons for the affirmance the reasons assigned in *Borden v. Louisiana State Board of Education*, 168 La. 1005, 123 So. 655, 67 A.L.R. 1183.

Article XII, Section 13 of the Louisiana Constitution provides in pertinent part that "no public funds shall be used for the support of any private or sectarian school." Article IV, Section 12 of the Louisiana Constitution provides in pertinent part that "the funds, credit, property or things of value of the State, or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person or persons, associations or corporations, public or private."

The Louisiana Supreme Court, per Overton, J., held that Act 100 of 1928 did not violate either Article IV, Section 12 or Article XII, Section 13. In so holding, the Court reasoned as follows:

"The appropriations were made for the specific purpose of purchasing school books for the use

of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries. It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children. In fact, in view of the prohibitions in the Constitution against the state's doing anything of that description, it would be legally impossible to interpret the statute as calling for any such action on the part of the state, for where a statute is susceptible of two constructions, one of which makes it unconstitutional and the other constitutional; the interpretation making it constitutional must be adopted. What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. This is the only practical way of interpreting and executing the statutes, and this is what the state board of education is doing. Among these books, naturally, none is to be expected, adapted to religious in-

struction." 168 La. 1005, 1020-21, 123 So. 655, 660-61.

The above language is quoted at 281 U.S. 370, 374-5, 74 L.Ed. 913, 915.

In *Borden, supra,* the contention was made that the lending of textbooks to the children was a violation of Article IV, Section 12 of the State Constitution. The Louisiana Supreme Court answered that contention as follows:

> "As relates to the contention that the statutes violate section 12 of article 4 of the Constitution, we do not find this contention well founded. The school books are not granted or donated to the children. The donating of them would have been unnecessary to the accomplishing of the purpose of the statutes. It is only the use of the books that is granted to the children, or, in other words, the books are lent to them, which implies that they are to be returned. While it is true that there is a lending here of things of value, belonging to the state, still this lending is not the lending prohibited by the Constitution. The lending there contemplated is a lending not connected with the reasonable exercise of the police power. Where the granting or lending of anything of value, belonging to the state, or any political corporation thereof, is necessary in the reasonable exercise of the police power, section 12 of article 4 of the Constitution was not intended to prevent the granting or lending. Were it otherwise, the state, or a municipal corporation, could not furnish, for instance, vaccine for the prevention of an epidemic,

> In fact, the Constitution presupposes the existence of the police power and is to be construed with reference to that fact. 12 C.J. § 415, p. 907; 6 R.C.L. § 193, p. 195. The furnishing of school books to the children of the state, for their use, in attending school, tends directly to promote the education of the children of the state and to obliterate illiteracy, thereby improving the morals of the children and promoting the general welfare and safety of the people, and hence comes within the police power. Cf. *Barbier v. Connolly*, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923. Our conclusion is that the foregoing pleas, directed against both acts, should be overruled." 168 La. 1005, 1021-22, 123 So. 655.

This Honorable Court, in *Cochran, supra*, commenting on the State Supreme Court's language, stated:

> "The court also stated, although the point is not of importance in relation to the Federal question, that it was 'only the use of the books that is granted to the children, or in other words, the books are lent to them.'" 281 U.S. 370, 375, 50 S.Ct. 335, 74 L.Ed. 913, 915.

In upholding the constitutionality of Act 100 of 1928, the Court reasoned:

> "Viewing the statute as having the effect thus attributed to it, we can not doubt that the taxing power of the state is exerted for a public purpose. The legislation does not segregate private schools or their pupils, as its beneficiaries, or attempt to interfere with any matters of exclusively private

concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded." 281 U.S. 370, 375, 50 S.Ct. 335, 74 L.Ed. 913, 915.

New Jersey Transportation Case

In *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711, 168 A.L.R. 1392, one issue presented to this Honorable Court was whether a New Jersey statute and a Board resolution passed pursuant thereto which authorized the Board to reimburse parents of students the amount of money spent on bus fares to attend parochial schools as well as public schools violated the Establishment Clause of the First Amendment to the Federal Constitution. In holding that the First Amendment was not violated, Mr. Justice Black, speaking for the majority, reasoned:

> ". . . [W]e cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit company to provide re-

duced fares to school children including those attending parochial schools, or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

"This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the

secular educational requirements which the state has power to impose. See *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468. It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

"The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here." 330 U.S. 1, 17-18, 67 S.Ct. 504, 512-13, 91 L.Ed. 711, 168 A.L.R. 1392, 1405-06.

The decisions of this Honorable Court in *Cochran, Supra*, and *Everson, supra*, are authority for the proposition that New York's Text Book Loan Law is not repugnant to the First Amendment to the United States Constitution. The books are loaned to the students and not the schools. Equally applicable to the case at bar is the statement made by the Louisiana Supreme Court in *Borden v. Louisiana State Board of Education*, i.e., "The schools, however, are not the beneficiaries of those appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. *The school children and the state alone are the beneficiaries.*" 168 La. 1005, 1020, 123 So. 655, 660, also quoted at 281 U.S. 375, 74 L.Ed. 915.

CONCLUSION

The decision of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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WILLIE D. MAYNOR,
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CERTIFICATE

I hereby certify that copies of Brief of Amicus Curiae, State of Louisiana, have been served on the attorneys for appellants, respondent, and intervenors-respondent by mailing the same to Marvin E. Pollock, Esquire, 80 Pine Street, New York, N. Y. 10005; Porter R. Chandler, Esquire, One Chase Manhattan Plaza, New York, N. Y. 10005; and Honorable Louis J. Lefkowitz, Department of Law, Albany, N. Y., by United States Air Mail, postage prepaid.

Baton Rouge, Louisiana, this 27 day of March, 1968.

Willie D. Mayronne
Of Counsel